No. 07-56

# In The
# Supreme Court of the United States

ESTATE OF MARY LOWE, BY ROBERT HARRIS,
COOK COUNTY PUBLIC GUARDIAN AND
SUPERVISED ADMINISTRATOR,

*Petitioner,*

v.

APEX TAX INVESTMENTS, INC.
AND JOHN HERNDON,

*Respondents.*

**On Petition For A Writ Of Certiorari**
**To The Supreme Court Of Illinois**

## BRIEF IN OPPOSITION


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## QUESTION PRESENTED

1. Whether, before real property is taken from its owner in a two-step delinquent tax sale proceeding, the person charged with giving notice is required by the Due Process Clause of the Fourteenth Amendment to take continual and additional steps to locate the property owner, above and beyond the multiple notices statutorily mandated during both steps of the delinquent tax sale proceeding, after mailed notice sent in compliance with the second step of the tax proceeding has been returned undelivered and bearing notations regarding "hospitalization"?

## TABLE OF CONTENTS


| | Page |
|---|---|
| Question Presented | i |
| Table of Contents | ii |
| Table of Authorities | ii |
| Respondent's Objection to Petitioner's Presentation of Questions for Review | 1 |
| Argument | 3 |
| Conclusion | 5 |


## TABLE OF AUTHORITIES

CASES

*Jones v. Flowers*, 547 U.S. 220 (2006) ..... 3, 4, 5

RULES

Supreme Court Rule 10 ..... 3

## RESPONDENT'S OBJECTION TO PETITIONER'S PRESENTATION OF QUESTIONS FOR REVIEW

The Public Guardian presents three questions for this Court to consider on review:

> 1. Whether the Due Process Clause requires that a homeowner be provided with notice of the judicial proceeding at which the title to her home, and all of her property interest in it will be extinguished once and for all?
>
> 2. Whether the party responsible for providing a homeowner with constitutionally sufficient notice is free to ignore an undelivered, returned notice, which either reveals the homeowner's actual whereabouts or contains information that is reasonably likely to lead to the discovery of her whereabouts, simply because the party took some reasonable steps to provide the homeowner with actual notice before the new information came to its attention?
>
> 3. Whether a finding of "due diligence," made as a matter of state law in an *ex parte* proceeding, may constitutionally foreclose a homeowner who did not receive actual notice of the proceeding from challenging, on federal constitutional grounds, the sufficiency of the efforts made to discover her whereabouts?

The Public Guardian's questions are improper in that they misconstrue and misstate the issue for review.

More specifically, the first two questions each fail to properly address the issue for review because they are narrow in scope and do not encompass all the relevant facts to be presented in this case – i.e., that the "judicial proceeding" referenced in the first question is the second

step in a two-step tax sale process, that the "undelivered, returned notice" referenced in the second question is one of a number of notices required by statute as part of step two in the tax sale process, and that the "reasonable steps" referenced in the second question are actual multiple notices required by statute in step one of the tax sale process. Thus, the Public Guardian's failure to encompass this case's two-step statutory tax sale proceeding into its questions misdirects this Court on the issue for review.

As to the Public Guardian's third question, it too clearly is improper. This question, as presented, would lead one to assume that this case involves a judicial holding that prohibited the Public Guardian from disputing the adequacy of notices sent to the property owner on constitutional grounds. This is absurd since the Public Guardian fails to even point out any judicial language from the Illinois state courts that hold that state law precluded the Pubic Guardian from raising its Due Process claim.

In summary, the Public Guardian's questions are improper and fail to address the real issue for review. At issue for review, is the constitutional adequacy of the notice sent by Apex under the two-step process mandated by Illinois law, and whether the mailed notice that was returned undelivered in step two of the process necessitated Apex to take additional steps to locate the homeowner of the property that Apex had acquired during a delinquent tax sale proceeding. Thus, the question to be presented for review must reflect this factual scenario.

## ARGUMENT

The granting of judicial review on a petition for writ of certiorari is discretionary with the U.S. Supreme Court. According to Rule 10 of the U.S. Supreme Court Rule, said review may be granted upon a showing of "compelling reasons." The Public Guardian does not provide any compelling reason to substantiate granting certiorari. Therefore, the petition for writ of certiorari filed by the Cook County Public Guardian (the "Public Guardian") in this instance should be denied.

As indicated in the Public Guardian's statement of facts, this is its second petition for writ of certiorari in this case. After the Illinois Supreme Court rendered a decision on October 20, 2005, that ruled against the Public Guardian, the Public Guardian filed its first petition for writ of certiorari. The petition was granted by this Court and remanded to the Illinois Supreme Court for reconsideration in light of the recent U.S. Supreme Court decision in *Jones v. Flowers*, 547 U.S. 220 (2006). On April 19, 2007, the Illinois Supreme Court on remand affirmed its previous decision. This second petition was filed thereafter.

The Public Guardian's disagreement with the Illinois Supreme Court's April 19, 2007 decision, based on its application and interpretation of the *Jones v. Flowers* decision, is not a compelling reason to grant the petition. The Public Guardian argues that it was judicial error for the Illinois Supreme Court to hold that the *Jones v. Flowers* case is distinguishable from the Public Guardian's case. The Illiñois Supreme Court distinguished the *Jones v. Flowers* decision from the case before it on the basis that the *Jones v. Flowers* case addressed a one-step, single

notice Arkansas delinquent real estate tax sale statute that was significantly different from the two-step, multi-notice Illinois tax sale statute. Yet, the Pubic Guardian in its petition acknowledges that the Arkansas statute and Illinois statute are very dissimilar. The Public Guardian, however, would have this Court ignore the dissimilarity and focus only on the second half of the Illinois two-step process because the actual taking does not occur until after step two, the judicial proceeding, has been completed.

This argument by the Public Guardian is illogical given that the judicial proceeding under the Illinois statute cannot occur until after step one, the administrative tax sale, has been competed. In other words, the actual taking under Illinois law occurs after both steps have properly been completed by the tax sale purchaser; it does not occur in isolation after the judicial proceeding. Thus, the Public Guardian's argument must fail because the *Jones v. Flowers* decision which addresses a case questioning a single notice in a one step process is clearly distinguishable from a case in which there are multiple notices sent in both steps of two-step process.

Furthermore, the Public Guardian's petition should be denied because in its April 19, 2007 decision the Illinois Supreme Court explicitly stated that even though it held that the *Jones v. Flowers* case was distinguishable, the Illinois Supreme Court did consider that case's ruling and applied it to the Public Guardian's case. In doing so, the Illinois Supreme Court also ruled that its decision to reaffirm its October 20, 2005 decision was consistent with the U.S. Supreme Court's decision in *Jones v. Flowers*. Indeed, the Illinois Court went on to state that the steps taken by Apex in the instant case to comply with due

process requirements exceeded those suggested by the U.S. Supreme Court in the *Jones v. Flowers* decision.

The Public Guardian's argument that the Illinois Supreme Court on remand failed to properly apply and interpret this Court's holding in the *Jones v. Flowers* case does not merit a granting of certiorari. The question of what notice is required in tax sale proceedings in order to comply with the Due Process Clause has been answered by this Court on numerous occasions, and most recently in the *Jones v. Flowers* decision. Thus, the real issue that the Public Guardian raises in its petition is whether the Illinois Supreme Court properly considered the *Jones v. Flowers* decision on remand. A review of the Illinois Supreme Court's April 19, 2007 decision should lead to an affirmative answer. The Public Guardian's disagreement with the Illinois Supreme Court's application and interpretation of the *Jones v. Flowers* decision in affirming its October 20, 2005 decision is not a compelling reason for review of this case.

## CONCLUSION

The Public Guardian's Petition For Writ Of Certiorari and all other relief should be denied.

Respectfully submitted,

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